

MINUTES

PLANNING COMMITTEE

January 21, 2016

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Mason K. Chock, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Lihu'e, Kaua'i, on Thursday, January 21, 2016, at 1:45 p.m., after which the following Members answered the call of the roll:

Honorable Gary L. Hooser (*present at 1:54 p.m.*)
Honorable Arryl Kaneshiro
Honorable Ross Kagawa
Honorable KipuKai Kuali'i (*present at 2:06 p.m.*)
Honorable Mason K. Chock
Honorable JoAnn A. Yukimura, Ex-Officio Member (*present at 1:52 p.m.*)
Honorable Mel Rapozo, Ex-Officio Member (*present at 2:04 p.m.*)

The Committee proceeded on its agenda item as follows:

Bill No. 2609 A BILL FOR AN ORDINANCE AMENDING CHAPTER 8, KAUAI COUNTY CODE 1987, AS AMENDED, RELATING TO HOMESTAYS (This item was Deferred pending the transmittal of a new bill from the Planning Commission on the related topic; once the bill is transmitted to the Council and is assigned to the Planning Committee, Bill No. 2609 will be concurrently placed on the Planning Committee agenda.)

Councilmember Kaneshiro moved for approval of Bill No. 2609.

Committee Chair Chock: Let me just give you a little bit background and then you can make that motion if you would like.

Councilmember Kaneshiro withdrew the motion for approval of Bill No. 2609.

Committee Chair Chock: If you would like to approve it, then we can move in that direction too. Since this was last heard, we have had a lot of discussion from the community and from members about an interest in keeping the homestays within the Visitor Destination Area (VDA). I have been in discussion with the Planning Department and Ka'aina Hull on this potential amendment to amend this current Bill; however, it was sent to our legal counsel and they said because the Bill is actually currently structured to actually address those outside of the VDA, that best route to accomplish this would be to get rid of this, either receive it or defer it until we hear the other bill. Also along with that, there have been other members that have approached me and have said that they would like to entertain this Bill with specific amendments. So, what I would like to suggest to the Committee is that we wait for the bill that is forthcoming from the Planning Department. It is on its way to the Planning Commission right now. It should be in in a few weeks, and that we can hear both options concurrently, one that retains homestays within the VDA and one that offers a process that we are currently looking at that is on the table now. That being said, the best route would be to ask for a deferral in that matter so that we can reach that point. I am anticipating about three (3) weeks or so. Along with

that, I know that there are a few questions, so maybe we can get the questions and testimony out, and then do a deferral if that is the will of the Committee.

Councilmember Kagawa: The Clerk informed me that we need to have a motion to approve even if we are not intending to approve it just so that we can have the matter discussed.

Committee Chair Chock: Great.

Councilmember Kaneshiro moved for approval of Bill No. 2609, seconded by Councilmember Kagawa.

Committee Chair Chock: Thank you.

Councilmember Kagawa: For discussion.

Committee Chair Chock: With that, I actually have a few questions. I do not see our Planning Department here yet, but I do have one question that I think goes to legal counsel. So if we could ask Mauna Kea to take the stand here.

There being no objections, the rules were suspended.

Committee Chair Chock: One of the questions that have come up, there are three (3) that I have, and Kaʻāina can answer those ones. The one that stands out is particular to some of these that are currently in contested case hearings, the homestays, and the request for grandfathering has come up. So there is specific testimony in Hawaiʻi Revised Statutes (HRS) 46-4, around that option or that it says here, and I will read it verbatim, "Neither this Section, HRS 46-4, nor any Ordinance enacted pursuant to this Section shall prohibit the continued lawful use of any building or premises of any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this Section or the Ordinance takes effect." If you could speak to that, I think, it would help some of those who are utilizing this Section as a potential way to validate their homestay, is the first question I have.

MAUNA KEA TRASK, County Attorney: Thank you, Councilmember Chock. For the record, Mauna Kea Trask, County Attorney. I apologize. I do not have the specific language in front of me, but I know HRS 46-4, I believe the operative word as you quoted was "grandfathering is allowed for continued lawful use" and that is the operative phrase, "continued lawful use." I do not know the specifics, but just speaking broad stroke generally, the use permit process has been around, I believe for agricultural lands since the 1970s at least.

KAʻĀINA S. HULL, Deputy Planning Director: For all lands.

Mr. Trask: For all lands. I am sorry. For all lands since the 1970s. If you had a continued lawful use, and that would be a permitted use, license or whatever it would be, that would continue; however, an unpermitted use or obviously an unlawful use would never have been lawful and therefore, not be subject to grandfathering.

Committee Chair Chock: Just to follow-up, and thank you for the clarification Kaʻāina, there has been talk that there was no process in place for homestays until recently. There are two (2) stories, really, to that. I think what is being challenged right now with the current submissions or permits are that hey, we did not have a process, we have been doing this for a long time, we have been doing it on agriculture, and been having some finances to it, but now the situation has

changed. So they are being looked upon differently and of course are not in a continued state because they never really got the permit process that we currently have. Can you speak to how that is being viewed?

Mr. Hull: Yes. Ka'aina Hull, Deputy Director Planning Department. There has been some discussion from the public concerning or requesting that homestay operations be grandfathered in, and much of that stems from the adoption of the Transient Vacation Rental (TVR) Ordinance. What essentially happened was when it was adopted, additional regulations were put on Transient Vacation Rentals and grandfathered in uses that have been existing, but missing from that discussion was the very fact that in 2009 when the TVR Ordinance was adopted, the legislation actively and officially acknowledged that there is and was a use permit process in place for homestays. So there is no grandfathering for homestays because as acknowledged in the legislation, use permits have always been required since 1972 and above and beyond that, the Department has also required it for the past twenty (20) years, there have been applications reviewed by the Planning Commission via the use permit process for homestays. So because that permit was there, in order to get grandfathered say...the only grandfathering for homestays that can go on is for those homestay operations that have a use permit, unless they were operating prior to 1972. If they could demonstrate that they were operating prior to 1972, yes, we can legally grandfather these uses in. Any operation after 1972, the only grandfathering that can occur is for those with use permits concerning the new standards that the body is discussing with the new ordinance.

(Councilmember Yukimura was noted as present.)

Committee Chair Chock: Okay.

Mr. Hull: So those ones would be grandfathered in, but anybody that cannot demonstrate prior to 1972, it just cannot happen.

Committee Chair Chock: Okay. Just to confirm then, this body does not have oversight over that grandfathering option, is that correct?

Mr. Hull: No, not over grandfathering.

Committee Chair Chock: Okay. Thank you. I have a couple more questions, but I will open up to any other Committee members at this time. Anyone else has questions on this?

Councilmember Kagawa: Yes.

Committee Chair Chock: Okay.

Councilmember Kagawa: Thank you, Chair. I know I touched upon it last time and we spoke about the possibility of no more homestays in the VDA, and there is the separate bunch that frequently comes to our meetings and they are in agriculture. Can you explain the process for those homestays that are in agriculture, what they need go through? We had some totals, right? We said three (3) out of the ten (10) had gotten approvals or five (5) out of ten (10)?

Mr. Hull: Sorry, I do not have those numbers in front of me. In the past year with the glut of homestay applications that came in, we had roughly seven (7) or eight (8) that came in were on agricultural lands.

(Councilmember Hooser was noted as present.)

Councilmember Kagawa: Okay.

Mr. Hull: One (1) has been denied by the Planning Commission.

Councilmember Kagawa: Okay.

Mr. Hull: Three (3) have been approved, and I believe three (3) or four (4) were recommended denial by the Department before the Planning Commission and they exercised their right to go into contested case hearing for the application to be reviewed. There are recommendations of denial for the three (3) or four (4), but no action has been taken as of yet.

Councilmember Kagawa: I thought I had heard previously from the Planning Director that there was another process that goes through the State, if you can touch upon that?

Mr. Hull: Yes, and that is the primary issue of contention for a lot of these applications, is that for the County, a use permit is required. The specific measure is to determine compatibility. It is a higher intensified use to determine compatibility of the environment, the neighbors, and those that frequent the area. For those on agricultural lands, any use that is not outright permitted under Section 205 requires a special permit. The primary function of the special permit is to determine that this higher intensified non-agricultural use is not going to prohibit, prevent, or take away agricultural lands from agricultural production; either the potential for it or the existing one from being removed. So, to preserve and promote agricultural production on agricultural lands. When these applications for homestays come in, and the Department has seen over the years that transient accommodations can serve to the detriment of agricultural production on agricultural lands. We are recommending to the Planning Commission that those applications that can demonstrate that their farm revenue is higher than their transit accommodation revenue, are thereby demonstrating that the primary use of the farm agricultural land is agriculture, and the transit accommodations are ancillary or accessory to that farm. If they cannot demonstrate that, in that the transit accommodation is making more than the farm, then in fact, the farm is accessory to the transit accommodation, which we find to be counter to the rules of the agricultural State Land Use district to promote and protect the agricultural lands for agriculture production. The one that was denied by the Planning Commission found that indeed because they could not demonstrate that the farm was making more, the Planning Commission denied that application. For those in contested case hearings right now, that is our recommendation, but the Hearings Officer is going to have go through the findings on their own and then come up with a recommendation to the Commission.

Councilmember Kagawa: 205 you referred to is HRS?

Mr. Hull: Yes, Hawai'i Revised Statutes Section 205.

Councilmember Kagawa: It is not the State giving the authorization. We are just saying that the State has HRS 205 that requires us to consider HRS 205 in considering whether a Bed & Breakfast (B&B) permit can be authorized for an agricultural property?

Mr. Hull: Correct, it is actually a State permit that the County will process on behalf of the State if the proposal is under fifteen (15) acres in size.

Councilmember Kagawa: Under fifteen (15) acres? For under fifteen (15) acres, it is a State permit authorized by the County body?

Mr. Hull: Correct, and if goes above fifteen (15) acres, then the Planning Commission's action is advisory to the State Land Use Commission.

Councilmember Kagawa: Over fifteen (15) acres, it is the Land Use Commission?

Mr. Hull: Correct.

Councilmember Kagawa: But the County gives the recommendation?

Mr. Hull: Correct.

Councilmember Kagawa: Thank you, Chair.

Committee Chair Chock: Thank you. Any further questions? Those members who just walked in, I am asking for a deferral on this item, but I wanted to answer some of the questions that have been coming up from testifiers on some of their options and so forth. I saw a hand up from Councilmember Yukimura. Go ahead.

Councilmember Yukimura: Just as a follow-up on Councilmember Kagawa's questions. You said of the seven (7) that were recently approved or applied for homestays on agricultural land, three (3) were approved, one (1) was denied, and three (3) the Planning Department recommended disapproval and they have gone into contested cases, is that correct?

Mr. Hull: The numbers are raw. It is give or take one (1) or two (2) in each way.

Councilmember Yukimura: Okay. What was the basis on which three (3) were approved?

Mr. Hull: Those applications demonstrated that the farms on-site, they came in with Schedule F (Form 1040) taxation forms as well as their regular taxation forms that demonstrated their farm was making more than the transit accommodations.

Councilmember Yukimura: Okay.

Mr. Hull: And thereby, we determined that the transit accommodations were accessory to the farm and we recommended approval.

Councilmember Yukimura: How do you verify the income from farm and the income from Transient Vacation Accommodations (TVAs)? Would there not be the incentive to deliberately make their TVR or their homestay income less than the farm, that is not fully declare it?

Mr. Hull: Well, the Schedule F tax filing is specifically for farm purposes. So we can look at the specific farm income generated by the site. Yes, we are aware that individuals could be lying on their taxation forms, but they have to take that matter up with the Internal Revenue Service (IRS). We are pretty sure that most people are providing truthful documents to both us and the IRS.

Councilmember Yukimura: How are you pretty sure?

Mr. Hull: I mean, could they have lied to the IRS? Yes. They could have, but there is far more punitive damages that can be done from the IRS for those that have essentially defrauded the American government from having to pay taxes. We are relying essentially on the enforcement of taxation laws by the Internal Revenue Service to ensure our documents are also in order. Could they be lying? Yes, but the IRS has a pretty big stake.

Councilmember Yukimura: Okay. So for the ones where you recommended denial or you denied, that is approximately four (4), that was the basis on which you determined the ratio of income from farming versus income of homestays?

(Councilmember Kualii was noted as present.)

Mr. Hull: In those applications, I want to say without them all before me, that there was no documentation provided to demonstrate that the farm is making more revenue, in many cases any revenue.

Councilmember Yukimura: No documentation provided for either source of revenue?

Mr. Hull: Correct. In some of the applications there are provisions of tax licenses and what not for the homestay operation; however, they did not provide documentation for farm income.

Councilmember Yukimura: So in some cases they provided documentation of homestay income, but not of far income.

Mr. Hull: Correct.

Councilmember Yukimura: Okay.

Mr. Hull: And just to further clarify, Councilmember, a lot of what the Department is drawing from is the State legislature amended HRS 205 recently or within past two (2) years to further clarify what a "bona fide farm" is. I think it has been a point of contention in enforcement and regulations on agricultural lands, is not being able to determine a bona fide farm. The legislature's move was to essentially say that the bona fide farm is qualified via it is revenue generation, that it is creating some kind of revenue. The legislature did not go so far as to say how much revenue equals a bona fide farm. So technically somebody can come in and say, "I made one dollar (\$1) in sales this year from my farm," and under the State law, it is a bona fide farm. In the special permit process, we are saying that we need to set the threshold relative to the TVR to determine which is the primary use of the property.

Councilmember Yukimura: Has this methodology been Administrative Procedures Act (APA)?

Mr. Hull: What do you mean APA?

Councilmember Yukimura: It sounds like almost a standard or regulation pursuant to a law that is required to be APA following the process of the Administrative Procedures Act.

Mr. Hull: The Planning Department has a recommendation as well as the Planning Commission in its action, have the authority to determine what is in the spirit of HRS 205 when concerning the protection and promotion of agricultural lands for agricultural production.

Councilmember Yukimura: I guess I have a question for the County Attorney. It seems that there is a rule being developed here, a standard, to implement the process of homestays on agricultural land. Is it your opinion that it does not have to go through the APA process?

Mr. Trask: I do not know if I can answer that question just because I do not have the documents in front of me. I do not like to speculate on what the law says because as you know, everything about the law is very language specific. So I would like to go see what that language is, if I could, and come back and look. I do know, and my understanding of what you are referring to, and correct me if I am wrong, when you say "APA," you are referencing Chapter 91, the Hawai'i Administrative Proceedings Act, also known as HAPA?

Councilmember Yukimura: Yes.

Mr. Trask: Okay. So you are referring to the due process, what either is the public notice 91-3 rule making process, where everyone is informed or the 91-14, contested case process where you have a contested case, which is proceeding by which someone rights, duties, and responsibilities are determined under the law. Is that what you are referring to?

(Council Chair Rapozo was noted as present.)

Councilmember Yukimura: It is a standard that is being used in administrative procedure or process that I think is in question because it is not a balancing of certain circumstances. It is an outright "this shall be more than this or less than this," otherwise it is not approved. It sounds like a standard that is like a rule. I do not know the answer to this. I am just asking the question.

Mr. Trask: Well, I guess would I like to see the law or the rule.

Councilmember Yukimura: Okay. We will make a request for a formal opinion.

Mr. Trask: That is great.

Councilmember Yukimura: Okay. Thank you.

Mr. Trask: Thank you.

Committee Chair Chock: Councilmember Hooser.

Councilmember Hooser: Good afternoon. Just a couple of questions. I believe I understand that when the Planning Commission grants a use permit to a homestay on agricultural land as long as it is shown to be ancillary in its income, then you will do it, generally speaking. There has been several people who testified who said their lands are not suitable for agricultural. It is effectively impossible to do agriculture and earn an income. I understand. Okay. Just from general knowledge, I understand that. I have seen lands like this. It seems like the conventional wisdom to say, "How are you going to grow anything on here," but it is zoned agriculture. How do you deal with those properties?

Mr. Trask: I think you make a good point, Councilmember Hooser. It is argumentative, I think. When I was in law school, I took Real Property from David Cales, who is well-known to be pro-development, that type of professor and he makes it known. I do not know. I am not a farmer. I worked on a farm once after high school in which after I did determined I am definitely going to go college. That is a hard life. I am here now. One of the things he always says is State land use agricultural is a de facto classification for lands in Hawai'i. He would maintain that mind. That was his position, and if you look at the history of Hawai'i and the strength of 19th and 20th century agricultural industry in Hawai'i, which inarguably was the driving economic force behind the huge changes that Hawai'i experienced from the 1800s to the 1900s. Good or bad, that was the economic driver for it. So there is an argument out there that yes, a lot of these lands are not suited for agricultural, but nonetheless it is designated as such. So therefore, the process provided to change that, as you know, is a redistricting or changing of the land use designation at the Land Use Commission (LUC). He would say, and again, I am not saying this is true, but just to provide perspective. He would say we need more rural designations and whether that is true or not, I do not know. It is arguable. But there is definitely an argument out there regarding that, but then again, if that is the case, then the orderly legal process would be to petition for land use designation boundary change and then see what the allowable uses thereon would be, not put the horse before the cart situation. I just wanted to share that with you. If Ka'aina has anything to add.

Mr. Hull: I cannot speak to specific applications particularly since we are in contested case hearing with some of them. But in general, we look at applications for those lands who may want to make the argument that I want to operate a homestay or transit accommodation on lands that are not suited for agriculture even though it is within the agricultural zoning district. The onus is on the applicant to demonstrate that. We are not going to take it at face value of I want a transit accommodation without even saying, "look at what I have, my lands cannot have any farms." We are not going to take that as "okay, we need to recommend approval." The applicant has to demonstrate thoroughly in the application process that indeed their lands are not specifically available or usable for agricultural production. The onus is essentially on them to demonstrate that they are promoting and protecting agricultural lands for agricultural production, and if their lands cannot avail themselves to agricultural production, they need to thoroughly document that and demonstrate that as well.

Mr. Trask: I would like to throw one (1) more thing in too just to give you more perspective. If you look at what we are looking at agricultural land now, which a lot of people with large contiguous relatively flat parcels of land, thousands of acres, hundreds of acres. Arguable, before the 19th and 20th century commercial agricultural model, the actual most productive lands in this island are now zoned Conservation. You are looking at Kalalau, the river valleys, Hanapēpē, and Waimea. That is where all the old infrastructure is. That is where all the taro was grown. That is where all the water is. So say from the Native Hawaiian perspective, you cannot grow anything up Hanapēpē Uka because there is no water. So irrespective if you are growing organic lemons up there, you are still taking all of the water out of the streams, pumping it up, putting down there so you can irrigate, whereas some people very much are passionate about the idea and the fact that just let the water flow where it is supposed to flow, and then you have to eat different food whether it is breadfruit, *kalo*, or whatever. Again, I am not being a farmer, but just to show what is agricultural land and what is the most appropriate place to grow. The future and all of these policy things that you folks are lucky enough to figure out. So that is that too.

Councilmember Hooser: A few more questions, just a few more. It is not my intent to overly complicate an already complicated issue, but reading HRS 205 it is clear that there are other uses permitted on agricultural land that are not necessarily growing crops or permitted use like wind farms and energy. So if the agricultural land is used for those purposes and the homestay is supportive of those, is that an acceptable choice?

Mr. Hull: No. The way HRS is laid out is that it basically states these are the outright permitted uses on agricultural lands, and at first and foremost is farms. Then the State legislature has taken moves to say there are specific priorities that Hawai'i is looking at that need to be addressed and can only be addressed on agricultural lands. So they laid out various things particularly in the utility area like wind farms or utility lines and whatnot or telecommunications that can be outright permitted on agricultural lands. Absent that list, if it is not on that list and it is proposed to the Planning Department, automatically a special permit is required. It is under the special permit standards that that use has to demonstrate that they are promoting and protecting agricultural lands for agricultural production.

Councilmember Hooser: Okay. Just one (1) or two (2) more. It has been stated in some of the testimony that because of historical use, people were having homestays that the law may have been silent on and therefore, they interpret it as a legal use and now we are taking that away and HRS says we cannot do that. We have to grandfather in. Could the County Attorney speak to that?

Mr. Trask: I touched on this earlier before. It has to be a continued lawful use.

Councilmember Hooser: Right.

Mr. Trask: As Ka'āina stated earlier, the permit process on State agricultural land has been there since 1972.

Councilmember Hooser: Actually, this is not just agricultural, but everything.

Mr. Hull: Yes.

Mr. Trask: Yes.

Councilmember Hooser: Okay.

Mr. Trask: So continued lawful use. The special use permit process has been there since the early 1970s, and so one of things you learn like in criminal law, is ignorance of the law is no defense.

Councilmember Hooser: Okay.

Mr. Trask: So beyond that, that is as general as I can get it. It needs to be more specific thereafter.

Councilmember Hooser: I guess I understand the use permit process has been in place, but has there been a law in place that says you must get a special use permit to get a homestay? I mean, was there a specific legal requirement saying that homestays need a permit?

Mr. Hull: Prior to the recodification of Comprehensive Zoning Ordinance (CZO) that happened two (2) or three (3) years ago in which there is an actual table of uses, the way that the CZO was structured back in 1972 and was held like that until recently, is it lists outright permitted uses that are outright permitted in the various zoning districts, then it lists uses in those zoning districts that require a use permit. At the bottom it says "Any use that the Director finds similar in nature to the aforementioned use permit uses would also require a use permit." Then there is a definition of homestays, and the definition portion of the CZO. I want to say the earliest permit was in the 1980s. Over the course of thirty (30) some odd years, you had four (4) or five (5) Planning Directors and their interpretation stating that a use permit is required for these applications.

Councilmember Hooser: Okay. Final question. It is my understanding that the intent is to receive or to defer it or something?

Committee Chair Chock: Yes. My request as the Committee Chair is to defer it until we get the new bill to the floor and look at them simultaneously.

Councilmember Hooser: I guess my question then, I am assuming that the Administration is recommending a new bill or is that coming from the Council?

Committee Chair Chock: It is coming from our Committee, yes.

Councilmember Hooser: So my question is why?

Committee Chair Chock: The interest has been, amongst Council discussion and in the community, to look for a way to reserve homestays within the Visitor Destination Area, and that is the reason why an amendment was entertained. The reason why we are moving to a new bill is that it takes away from the original intent of the current Bill, and that is why it is being reintroduced or a new bill is being introduced for that purpose.

Councilmember Hooser: If I could just restate, is it the County Attorney's opinion that we cannot amend the existing Bill because if the intent, I think what I am hearing, is to carve out the existing language that says that homestays be permitted in residential districts with the use permit, the intent is to take that out, and we are not able to do that with existing Bill?

Committee Chair Chock: That is the advice I have been given, but he is right here if you would like to ask that question.

Councilmember Hooser: Yes.

Mr. Trask: I actually personally have not opined on that. I have to go look at the content of that opinion before...

Mr. Hull: I can give some insight into it. There was no official opinion given out, but in discussions with Councilmembers and as was made here on the floor previously, was that there was some intention to amend the draft ordinance that we sent up to restrict it solely to the VDA. The Department has no objections to that amendment. We submitted the draft bill that allows it outside the VDA via the use permit process contingent upon functioning from the assumption that there is a permit process wanting to be put in place or a use permit process to be clarified for these operations, and that is what we sent up. However, if there is movement to restrict those operations strictly to the VDA, the Department does not object. It aligns actually more specifically with the TVR Ordinance and keeping transit accommodations in the VDA. The only thing we would be recommending is

that those same standards that we already have in our draft bill, that they operate under, still be held to those in the VDA. So being that the Attorney and our Department discussed whether or not that amendment could happen, it would be considered a substantive change and therefore requires the Planning Commission re-review. So in the interest of time management, the Department agreed to essentially introduce it on our end so the Planning Commission can review it. They will actually be reviewing it this coming Tuesday, and if they take action, to send it up to you folks for your review.

Councilmember Hooser: So it would be an administrative initiated action?

Mr. Hull: Officially it is, but it was after discussions with Councilmembers that had expressed an interest in amending the ordinance to restrict it to the VDA.

Councilmember Hooser: Right. I do not remember that discussion. We have had some hearings and people have testified, but I do not remember any in-depth discussion about what the Council wanted to do.

Mr. Hull: Statements were made particularly on the floor concerning that.

Councilmember Hooser: Okay.

Mr. Hull: We saw that and decided to initiate it.

Councilmember Hooser: Okay. Again just to restate, and I do not want to put words in your mouth, but I need to know. Is it the Administration or County Attorney's opinion that we cannot amend the Bill that we have here? I mean, in terms of process, historically I think it is more difficult to add things or take things out than to add. So the Bill came to us including a use permit. If you could address who is saying that we need to do this.

Mr. Hull: Well, it was in discussions with the Deputy County Attorney that is assigned to the Planning Commission, and like Mauna Kea said, there has not an official opine, but it was essentially determined that would be a substantive change that should that amendment is proposed here, to be resent back to the Planning Commission and reposted.

Councilmember Hooser: Okay.

Mr. Hull: It would probably delay another month. So seeing that we could initiate it at a much quicker rate, we decided to do that.

Councilmember Hooser: Okay. Just follow-up real quick. If after the discussion came in and it was the will of the Council to include residential with use permit, would that then be an amendment that cannot be made that has to be sent back again?

Mr. Hull: Well, you would essentially have two (2) draft bills before you, one that allows it outside of the VDA via the use permit process and one that restricts...or should I say if the Planning Commission takes action, you would have two (2) before you, one that allows it outside of the VDA via the use permit process, and one that restricts it only to the VDA. So if it is the Council's discretion to approve one or the other, you would have both in front of you essentially.

Councilmember Hooser: Okay. Thank you.

Councilmember Chock: Follow-up question.

Councilmember Kagawa: Basically what you have is you have two (2) options that have had Planning Commission review?

Mr. Hull: Correct.

Councilmember Kagawa: Instead of just one (1) option with Planning Commission review and one (1) option that the Planning Commission did not review.

Mr. Hull: Correct

Councilmember Kagawa: But if we amended it to say well, we want to restrict to only inside the VDA, then that amendment would not have gone through the Planning Commission review, right?

Mr. Hull: Yes. If you did it here on the floor, which is why it is required to go back.

Councilmember Kagawa: I appreciate that because I think this whole homestay issue is the Planning Commission's *kuleana*. I just want to make the policy part the Council's job, our foresight, of what we want to see and then you folks make the nuts and bolts, detailed decisions. Thank you.

Committee Chair Chock: Follow-up question? Councilmember Yukimura.

Councilmember Yukimura: I hope we are not saying that the Committee initiated this because I do not think there was any vote. It might have been the Chair, but not the Committee.

Committee Chair Chock: Correct.

Councilmember Yukimura: In the bill that is before the Planning Commission, are you grandfathering in all those who have gotten permits to now?

Mr. Hull: If they have of a use permit, they are entitled to that operation. Say in the event that a bill is passed that restricts homestays solely to the VDA, for those operations that have secured use permits through the use permit process, they are entitled to that use.

Councilmember Yukimura: So the bill has to grandfather them in?

Mr. Hull: Those with use permits, correct. I mean, the Bill does not...

Councilmember Yukimura: And the bill does say that?

Mr. Hull: That is not necessarily how grandfathering works. Grandfathering is just a mechanism that is already established under State law, that if it was legally operating prior to the adoption of a new ordinance that no longer allows it, that can continue as a use lawfully.

Councilmember Yukimura: Okay. It is possible to use other standards, not grandfathering, that would allow long-time operators to operate?

Mr. Hull: I believe there are mechanisms. In particular, the TVR Ordinance allowed TVRs in the Agricultural district, say to operate, if they could demonstrate taxation records and what not.

Councilmember Yukimura: But that was for grandfathering ones.

Mr. Hull: Well, when I say the Agricultural district is because they had not actually gotten a special permit. So they still needed to go through the special permit process.

Councilmember Yukimura: But they had to be grandfathering in. They had to be operating prior to the date that Transient Vacation Rentals were outlawed outside of the VDA area, were they not? Did you allow new agricultural operations that were started after the TVR law prohibited TVRs in VDA areas?

Mr. Hull: No.

Councilmember Yukimura: Okay. So they were under the grandfather clause?

Mr. Hull: Yes and no. I mean, because there is grandfathering, which specifically just allows operations that were existing just to continue operating. The TVR Ordinance sets specific standards in which they would be allowed to continue operating, but the TVR Ordinance is not a clean grandfathering mechanism. A clean grandfathering mechanism just means if you are operating, you are good. The TVR Ordinance says if you have this documentation and you can demonstrate it, then you are good. That is why I would not want to necessarily align the two (2) and say it is a grandfathering mechanism.

Councilmember Yukimura: Well, you have to have been operating in order to have documentation. So it is not that the documentation creates your operations. You were operating.

Mr. Trask: I would just add, continued lawful use. You can have an unlawful operation.

Councilmember Yukimura: So how did the ones that did not have a Special Use Permit get to be grandfathered in if they did not have a Special Use Permit prior to the TVR law that prohibited TVRs from operating outside of VDA areas, which agricultural areas are?

Mr. Hull: Technically, there is no such thing as Special Use Permit. You have use permits and you have special permits.

Councilmember Yukimura: Okay. Special permits then.

Mr. Hull: Okay. Those ones have to demonstrate that they met the documentation criteria of the TVR Ordinance in order to get into the queue to go before the Planning Commission for action on a special permit. So they demonstrate the documentation first in the same manner that the Residentially zoned folks did. The Residentially zoned folks, under the TVR Ordinance therefore are stamped and are allowed in. But for the agricultural folks they have to demonstrate that to then apply for the special permit.

Councilmember Yukimura: But they did not have a special permit so they were not legal. They were not fully legal?

Mr. Hull: Correct.

Committee Chair Chock: Councilmember, if we could direct it to homestays. I hear where you are trying to get answers from the TVR scenario.

Councilmember Yukimura: Well, I am trying to understand how we allowed TVRs in agricultural lands when they did not legally have special permits?

Mr. Hull: As I was saying, they came in for the special permits, and until they secured the special permit, they could not be operating.

Councilmember Yukimura: They would not be grandfathered.

Mr. Hull: Correct.

Committee Chair Chock: Go ahead, Council Chair.

Council Chair Rapozo: It is a follow-up. So the County Ordinance basically allowed grandfathering where they were not really entitled to it, that is the real question? The fact is the ones that did not have, and this is a question maybe for you Mauna Kea. When they came in for their, and the only reason I bring this up of using TVRs because like I said, I wanted to have the discussion so we do not copy or do the same mistakes. The fact is someone that was unlawfully operating in agriculture, right, was able to get a permit if they had provided documentation that told the County that they met the requirements for a special permit. That was a Council action. The Council did that. The Council passed that law, correct? So we have people that were grandfathered, not under the grandfather clause, under Council action. That basically said we are going to open it up to more than what was technically allowed to do. That is what this Council did back then, not this Council, but the Council at the time, and that was the big argument. Why were we doing that? But we are there and it is done. As far as B&Bs, are we not able to not create a new grandfather clause and just use the existing legal requirements of lawful operation? If they are not operating lawfully prior to the passage of the ordinance, they are done. Mauna Kea, is that not what the Council needs to consider?

Mr. Trask: I would say generally, yes.

Council Chair Rapozo: Is it true though, that as the testimonies we have gotten that said, "Oh, the Planning Department said it was okay." That creates some problems. When people went up and oh, whatever you need to get a permit or do not need to get a permit. That is the allegations that have been made. I do not know if we can backtrack those allegations to actual documentation that said that because anybody say anything that they want. The question is, has that occurred where people were allowed to operate because verbally or some memorandum said "do not worry about it, you can continue." Do we even know if that existed?

Mr. Hull: We are aware of the allegations. We have done extensive research into seeing if there a memorandum, documentation, or what not, what have you generated in the Department that expressed that. We have not found any to-date. We also know there was some confusion between the Planning Department and Real Property in that if homestay operations came in, they were not necessarily required to pay the TVR tax, I believe, and therefore was not necessarily a process for them at the Real Property Department, which may have created confusion to possibly the idea if nothing is necessary them for homestays when in fact, at the Planning Department via a use permit is required.

Council Chair Rapozo: Right, that has been the case. As far as the agricultural area is concerned, if they do not have that special permit from the State, then they are not operating lawfully, correct?

Mr. Hull: Correct.

Council Chair Rapozo: Thank you.

Committee Chair Chock: Go ahead, Councilmember Kualii.

Councilmember Kualii: Just a really basic question. The reason this Bill is before us and if this Bill were approved, it would allow homestays outside of the VDA, and if we do not support homestays outside of the VDA, then we cannot support this Bill. That is why maybe that is why a couple of Councilmembers have expressed interest in creating a different bill, and that is why you have provided some information on that and why we might have another bill?

Mr. Hull: Yes. Like I said, that had come up at the first reading discussion. Statements were made to the effect that there is interest in restricting it solely to the VDA. We did have, yes, meetings with other Councilmembers, but I think it primarily stemmed from the first reading and statements made by Councilmembers. We had discussions on when we get queried, what is our position on this, and after looking into it, we have determined that we have no objection to that amendment should it be proposed. But even further looking into because it is considered a substantive change, it would have to go back to the Planning Commission. So in the interest of time, we just initiated it.

Councilmember Kualii: Thank you.

Committee Chair Chock: Any other questions? Councilmember Hooser.

Councilmember Hooser: Yes. So the original Bill that came over from the Planning Commission included allowing a use permit process in residential areas. So is it correct to say it was the position of Planning Commission and the Planning Department when the Bill was presented?

Mr. Hull: Correct. I will still say it is. Operating from the assumption that if the policy decision is to allow these outside of the VDA, these are the parameters we and the Planning Commission are recommending be put in place to regulate those operating inside the VDA. However, if there is a policy decision to look into restricting it solely to the VDA, because the Planning Commission has not reviewed it, the Planning Department has no objections to that because it does align with other transit accommodation policies that have been set forth by this County.

Councilmember Hooser: But the Planning Commission and the Planning Department preferred to allow it in the residential area with a use permit?

Mr. Hull: I cannot say that because they have not reviewed the...

Councilmember Hooser: That is the document that we got?

Mr. Hull: Well, I would not jump to the automatic conclusion that it prefers to allow it because like I said, that draft bill is assuming that homestays should be allowed outside of the VDA, here is the parameters in which

they need to operate because currently they are allowed outside of the VDA. So it is just saying under the existing use permit process, here are additional standards that should be imposed upon homestay operations. I cannot say on behalf of the Planning Commission that they prefer them to be operating outside of the VDA.

Councilmember Hooser: Thank you.

Committee Chair Chock: Clarification?

Councilmember Yukimura: Are you saying that homestays are not allowed outside VDAs, but they are allowed inside VDAs without this bill that is going to be coming forth?

Mr. Hull: Say that again.

Councilmember Yukimura: Are you saying that homestays are allowed in VDAs, but not outside of VDAs through this Bill that is before us now?

Mr. Hull: No. That is the draft bill that the Planning Commission is going to be reviewing on Tuesday.

Councilmember Yukimura: Is it not fair to say that the Planning Commission and the Administration's position that provided the Bill was that homestays be allowed under certain permit processes?

Mr. Hull: I do not want to make statements for the Planning Commission, when it has not reviewed the other draft bill. All I with say is use permits are required of operations now, and the draft bill that was...

Councilmember Yukimura: In VDAs or outside of VDAs?

Mr. Hull: Outside of the VDAs, and the Planning Commission is presented with a draft bill that imposed additional regulations for the operations. They were not presented with a bill that discussed whether or not they should be in the VDA. So once they review the draft bill on Tuesday, and take action, then we will be able to determine whether or not the Planning Commission does indeed prefer them outside or inside the VDA.

Councilmember Yukimura: When this present Bill went to the Planning Commission, the status of the law was the interim Bill that we passed.

Mr. Hull: Correct.

Councilmember Yukimura: And that allows homestays inside VDAs and outside VDAs if they go through a permit process, correct?

Mr. Hull: Correct.

Councilmember Yukimura: So there is nothing that is allowed outright without a permit process?

Mr. Hull: Correct.

Councilmember Yukimura: And this Bill has additional permit processing?

Mr. Hull: It has additional regulations that will be imposed. For example, a septic system will be required as well as an annual renewal to ensure that they meeting the standards.

Councilmember Yukimura: Okay.

Committee Chair Chock: If there are no further questions, I just have a couple more. Go ahead.

Councilmember Kagawa: So the Planning Commission knows that there are a lot of B&Bs, unpermitted B&Bs, and Airbnbs out there. We went online at the meeting two (2) weeks ago. Was it last week's meeting?

Mr. Hull: Last week.

Councilmember Kagawa: And we saw what? Nine hundred (900) hits, and then on another time, it was three hundred (300) something. How much permits do we have out in B&Bs right now?

Mr. Hull: For homestays?

Councilmember Kagawa: Total.

Mr. Hull: Are you talking about TVRs and homestays?

Councilmember Kagawa: No, just homestays. When you pull up B&Bs, you are going to get Bed & Breakfasts. You pull up TVRs, you get a whole bunch of other TVRs. They are differentiated in Google. I looked through that. TVRs Kaua'i, I pull up, there is a lot. I go B&Bs and Airbnbs. So, B&Bs are not TVRs, that is my understanding.

Mr. Hull: Yes, definitely under law, under interpretation, and in the zoning, homestays and TVRs are two (2) different animals.

Councilmember Kagawa: Yes. So how much...

Mr. Hull: I just caution in the sense that Airbnb, which is Air Bed & Breakfast is the name of the website that is often used. There is other websites that give you B&B and whatnot, but Airbnb kind of implies that they are B&Bs. They are all B&Bs or they are all homestays, when a lot of them in fact, the majority it appears, are actually Transient Vacation Rentals advertising on Airbnb. So I just want to caution on that.

Councilmember Kagawa: Okay. Well, that clarifies that for me then. Maybe my assumption is wrong.

Mr. Trask: It is actually a confusing thing. I think you illustrate the point well in that even if you look at the Code, the definition of Bed & Breakfast says see "Homestay, Transient Vacation Rental, Single-Family Transient Vacation Rental, and Multiple-Family Transient Vacation Rental." So B&B is defined in reference to other transit accommodations, whereas a homestay is like a TVR you live in.

Councilmember Kagawa: The Planning Commission knows that there are a number of unpermitted the B&Bs out there, and do we have any estimate how much is out there?

Mr. Trask:

I would say "choke."

Mr. Hull: Yes, that is why the discussion came with the Director when he was here last week. It is hard to say in particular when you get into the whole shared-economy sense in the way these sites are being operated. Potentially everybody in this room is a TVR operator. I mean, we often look at TVRs as if they are all operating every day as a TVR, but a lot of what is on that site is I decided to go on vacation, I put my house up for a week while I am gone to be a TVR. They are not a TVR operating in the sense that they are always running a TVR, but that is a violation of the County Code and they are TVR operation. In order to determine an estimate, it is so wide. We cannot get a specific handle to give you an approximate number. On any given day, it ranges to three hundred (300) to nine hundred (900) on Airbnb alone. Vacation Rentals by Owner (VRBO) can range from two hundred (200) to eight hundred (800) that you see. So it is hard to actually put your finger on what is exactly out there.

Councilmember Kagawa: I think my question is why would the Planning Commission okay a recommendation from Planning Department? I want to know the reason why you would allow a bill to come out knowing we have an unregulated B&B problem, that you want to include a bill that came before us right now, sitting in front of us, that allows additional homestays in the residential areas when you do not even know what is out there. I want to know. Is that because they wanted a way that they could have these unregulated ones feel welcomed and come in? Here is the process that we can get you to be regulated, and it is going to be a straight forward process that you can come before the Planning Commission, we can get you legal, and we can know that you are there operating? Is that why you folks did that bill to try and tackle this problem of unknowns that are out there and to try to make a process or did you folks feel like gee, even if we do not know how many unregulated ones are out there, we will open it up to more? What was the reason?

Mr. Hull: No. The draft Bill does not open up any measure to now allow homestays via use permit. They have always required a use permit since 1972.

Councilmember Kagawa: So we did not change anything?

Mr. Hull: No. All we are just saying is these additional regulations should be imposed upon these operations via this existing permit process.

Councilmember Kagawa: Okay.

Mr. Hull: Given the fact that there may be a policy discussion on, "no, we need to restrict it solely to the VDA," we are also saying that we have no objection to that.

Councilmember Kagawa: My feeling is why did we have that companion bill when we already said there is a process already? I am feeling like this Bill came forward to say the Council agrees with us that we should open up more B&Bs and have a process outside the VDA? You have heard my concerns. I am concerned. I really want to know what is out there first before we open up the floodgates. Thank you, Chair.

Committee Chair Chock: Councilmember Yukimura, Councilmember Hooser, and Chair Rapozo.

Councilmember Yukimura: The existing Bill before us today would have outlawed Airbnbs without permits?

Mr. Hull: Currently under the existing law, not this draft Bill, under the existing law, any transit accommodation, TVR, or homestay on any website that does not have the appropriate permits is outlawed.

Councilmember Yukimura: You have obviously been cracking down on the homestays. Have you begun to crackdown on the Airbnbs?

Mr. Hull: Can clarify if you are talking about TVRs on Airbnb?

Councilmember Yukimura: No, I am talking about Airbnbs, people who are renting out rooms.

Council Chair Rapozo: I just want to clarify real quick. Airbnb is a company.

Committee Chair Chock: Yes.

Council Chair Rapozo: Airbnb is a company just like VRBO. It is not an item. It is a company.

Councilmember Yukimura: Good. Thank you.

Council Chair Rapozo: It is just a reservations system for B&Bs.

Committee Chair Chock: And they have everything under the sun.

Councilmember Yukimura: Okay. Good. Thank you for the clarification. Have you been cracking down on either TVRs or room rentals where there is a resident homeowner? Have you been cracking down on any of that?

Mr. Hull: There has been enforcement actions against homestay operations, yes.

Councilmember Yukimura: But I am talking about not the ones that have been existing for a long time, but brand new ones? Okay. So the last that have popped up under Airbnb?

Mr. Hull: Yes, we have been taking enforcement actions against those that are listed.

Councilmember Yukimura: And what forms has that enforcement action taken?

Mr. Hull: Ultimately if they are determined to be in violation, a cease and desist letter or zoning compliance notice. If there is failure to act on the zoning compliance notice, then a notice of violation is entailed.

Councilmember Yukimura: How many notice of violations have been sent?

Mr. Hull: I do not have those specific numbers. I know Mike had those numbers when he made his presentation to you folks last week.

Councilmember Yukimura: These are Airbnbs or recently developed room rentals or homestay rentals?

Mr. Hull: I do not quite follow. We have issued, I want to say the number is roughly three hundred (300) to four hundred (400) in the past year cease and desist notices to transit accommodations. Some of them are homestays. Some of them are transient vacation rentals. We have effectively shut down this past year, seventy (70) some odd transit accommodations which includes both homestays and transient vacation rentals.

Councilmember Yukimura: Okay. Thank you.

Committee Chair Chock: Councilmember Hooser.

Councilmember Hooser: I appreciate your patience and the clarity. There is a lot of moving parts here. So I would just like to get myself a little bit more clear and I think the public also. If someone owns a condominium in Po'ipū, Kūhiō Shores or something, that is in a VDA, is my understanding. Do they need a permit to rent out that room?

Mr. Hull: Well, that is the discussion.

Councilmember Hooser: Under existing law?

(Councilmember Kagawa was noted as not present.)

Mr. Hull: Yes, under existing law, they do need a permit. For a homestay operation, they do need a zoning permit in the VDA as well as outside of the VDA.

Councilmember Hooser: Okay. So if they rent out the entire condominium, do they need a permit?

Mr. Hull: Yes. Well, hold on. And the owner is not on-site?

Councilmember Hooser: Right. It is like a TVR, but it is a condominium.

(Councilmember Kagawa was noted as present.)

Councilmember Hooser: It is a condominium, it is empty, I want to rent it out, do I need a permit?

Mr. Hull: A zoning permit is necessary if there is going to be a change in use. If it is Residential use right now and it is going to be converted to Transient Vacation Rental use, it does require a zoning permit.

Councilmember Hooser: It is my understanding that most of these units were used for both, the owners stay for a few months, they leave, and they rent it out. It is in a vacation rental pool.

Mr. Hull: Yes.

Councilmember Hooser: I did not know they had to get permits for this.

Mr. Hull: Technically for a change in use, you do need at the very minimum, a Class I zoning permit.

Councilmember Hooser: Do you believe that all of those condominium owners have these permits? I thought they just put it in the pool, Aston Resorts or whoever, and rent it out on a regular basis. This is the first time I...

Mr. Hull: Many may not have the Class I zoning permit, which is an over-the-counter administrative permit.

Councilmember Hooser: But if they do not, then they are operating illegally too I guess?

Mr. Hull: Technically they are operating illegally, but the rectification for that is just coming in for a Class I zoning permit...

Councilmember Hooser: Okay.

Mr. Hull: ...which is relatively easy versus those that are operating without a necessary use permit.

Councilmember Hooser: If you are in the VDA, all you need is this simple permit to operate a TVR?

Mr. Hull: Correct.

Councilmember Hooser: Okay. But if you are in the VDA under today's law, then you cannot operate a homestay legally under today's law?

Mr. Hull: You would have to get a Class I zoning permit.

Councilmember Hooser: Which is the same kind of simple permit you just talked about? Okay. Back to the data. We talk about it being between three hundred (300) and nine hundred (900) units and we do not know how many of those are in the VDA or how many actually have permits or not, right? There could be hundreds of them permitted, but Airbnb who is the booking service includes those permitted ones?

Mr. Hull: Yes. There are many on that website that have permits that are not officially listing their permits and technically, they are in violation of the TVR Ordinance. We are in the process of enforcing upon those being advertised on various websites.

Councilmember Hooser: Okay. Thank you.

Committee Chair Chock: Council Chair.

Council Chair Rapozo: Yes, I had one, but I think I am good.

Committee Chair Chock: Okay. Do you have a follow-up?

Councilmember Yukimura: Could you not subpoena Airbnb and require them to give you all of their records of operations on Kaua'i?

(Councilmember Kaneshiro was noted as not present.)

Mr. Hull: We have not gone that route. We are doing enforcement routes on the website as far as using those as the initial...

Councilmember Yukimura: Why have you not done that route? It seems to me you could get a complete record of everybody operating.

Mr. Hull: We can look into that with the County Attorney.

Committee Chair Chock: Go ahead.

Council Chair Rapozo: I think you need a case first. You cannot just issue a subpoena. You have to have a case, some kind of action.

Councilmember Yukimura: Well, a regulation that requires everybody to get a permit.

Council Chair Rapozo: I would guess, Mauna Kea, if you suspect or if you open up a file on a specific unit, then I think you could get a subpoena if they refuse to turn over the records. But I do not think we have the authority to blanket subpoena Po'ipū Shores or Airbnb, for that matter, for all their records. I could be wrong. I do not know. Airbnb would toss that away.

Mr. Trask: I do not know of anything in the Code that gives us...the Office of the Prosecution Attorney under, I think it is HRS 28-5. I am not sure, but they have administrative investigative powers.

Council Chair Rapozo: Yes, but could they issue a subpoena to everybody on Kaua'i to see who has a driver's license?

Mr. Trask: Civil County or prosecutors?

Council Chair Rapozo: Prosecutor or civil. I mean, I think that there has to be a nexus or reason to issue a subpoena.

Mr. Trask: Yes. Prosecutors can issue administrative investigative subpoenas if like you said, there is reasonable suspicious or probable cause or something like that. But there is not a concurrent one that I am aware of for County Attorney's or the Planning Department. I know that for example, in our Building Code, oh no, it is not Building Code. The Department of Health can subpoena. It is clear in the law, but I do not know.

Committee Chair Chock: I want to bring the conversation back to this Bill and the bill being proposed.

Councilmember Yukimura: Well, did...

Committee Chair Chock: I mean, we have had the discussion on enforcement law week. We will continue, as I heard last week, to have discussions on enforcement. Really, I think, the question is about which is your preference. Which way do you want to go in trying to provide a process or limiting homestays on this island? That is why I am saying we have choices coming forth and let us defer this so that we can hear both of them. I am doing that out of the request of some who have said, "No, we want to continue the road we are currently on." So I am willing to do that. If there are questions about this Bill on the table or the one that is being proposed to the Planning Commission, please, go ahead.

Councilmember Yukimura: Well, my questions are about the enforceability of both bills?

Committee Chair Chock: Do you have a question?

Councilmember Yukimura: Yes. My question is, if you have all of these website advertisements, then it seems to me there is some kind of probable cause to show that Airbnb, for example, is involved and that it would be appropriate, and if it is not, can we include it in the law, Mauna Kea, to allow that kind of enforcement action to subpoena records so that we can determine who is operating an Airbnb only Kaua'i? Can we amend the bills to provide that kind of enforcement capability?

(Councilmember Kagawa was noted as not present.)

Mr. Trask: I do not want to be argumentative. I will just say...

Councilmember Yukimura: I am just asking a question.

Mr. Trask: Well, I understand. I guess the best I can answer is you can go on Airbnb at any time. Say you go on there and you see something.

(Councilmember Kaneshiro was noted as present.)

Mr. Trask: We know that this unit or this lot has a house that they are advertising Airbnb, Ka'aina folks check it, and they see there is no permit or anything. That gives them requisite reasonable suspicion or probable cause to take it forward, send a cease and desist, and then you have the person on. You can subpoena during the contested case hearing process if there is one, if they do not just stop and they cease, to subpoena Airbnb and their records. But I think the effect would nonetheless...you have that affirmative statement. It is like a statement against interest. The rules of evidence are lax in the contested case hearing process. All I would do and what I have done in one of my cases, I just go on Trip Advisor and look this place up under the brand name and see the comments, the replies, and everything they have over there. It is all just statements against interest, it is omissible hearsay even if rules of evidence applied. There is no real necessity for me, I have seen yet, to subpoena an out-of-State company, who I do not know where they are incorporated, or where their corporate offices are, or service agent is. I can just go to the internet and press "print" in my office, and I have the goods as it is. I can just cross these folks on the stand to say, "Hey, how long have you been operating?" "Oh, a year." "Well, we have Trip Advisor comments from ten (10) years ago." It is kind of like...

(Councilmember Kaneshiro was noted as present.)

Councilmember Yukimura: Okay. I am sorry if I am repeating some of this. I was not present at last week's discussion. Is the Planning Department committed to a systematic enforcement process like that?

Mr. Hull: Yes.

Councilmember Yukimura: And you have already done that systematically, everybody on Airbnb was sent a cease and desist order?

Mr. Hull: No. The initial process that went down was using real property records and combing through those records to determine who is essentially paying vacation rental taxes without having the appropriate vacation rental land use entitlements. We went through those and that is why we had that spike with three hundred (300) to four hundred (400) cases to investigate. Now that

we are done with that list, we are moving on to systematically essentially looking at the respective websites.

Councilmember Yukimura: Okay.

Committee Chair Chock: Kaʻāina, just in terms of as it is related to Homestead class, exemption long-term, and affordable exemption, there were questions about its applicability. So these two (2) classes might qualify for tax cap and maybe should not, via the homestay, B&B, and then ten (10) year leases. I know I have vetted this with you earlier, but I wanted you to be able to speak to it as well, in terms of these two areas of concern.

Mr. Hull: The concern has come up, the way in which the Department and thanks to this body, adopting rules to ensure that the homeowner is actually living on-site was to have the applicant first demonstrate that they qualify for a homeowner's exemption.

(Councilmember Kagawa was noted as present.)

Mr. Hull: That way we can determine that the homeowner is living on-site and then self-regulate. There has been concern from the public that homestay operators are getting a homeowner's exemption and a Homestead classification (i.e. a tax break). That merits discussion of saying perhaps additional exemptions should not be allowed for commercial operations such as homestays. The Department would have no objection to that. It is also a discussion to be had the Department of Finance as far as enforcing or adopting rules to that effect.

Committee Chair Chock: Okay.

Mr. Hull: But we have would have no objection to that.

Committee Chair Chock: Okay. Thank you. I have been told that we had a Special Council Meeting scheduled for Executive Session that needs to be called to order. I am going recess the Committee at this time. I will turn it over to Council Chair Rapozo.

There being no objections, the Committee recessed at 2:55 p.m.

The meeting was called back to order at 2:58 p.m., and proceeded as follows:

Committee Chair Chock: I would like to get into public testimony, if possible. Okay.

Mr. Hull: There is actually one (1) thing to clarify. Councilmember Hooser, in my response to your question for inside the VDA, I have to correct myself. Inside the VDA, currently actually homestays require a use permit and that is because of the language in the CZO that specifically states that Director can only fine things similar in nature in the use permit process, and because it is not listed as an outright permitted use in the VDA, we cannot issue over-the-counter permits. They have to go through the use permit process as well. This draft Bill as well as the one before the Planning Commission both recognize that in the VDA, they should be permitted via Class I over-the-counter permit process.

Committee Chair Chock: Go ahead. Follow-up.

Councilmember Kagawa: How many homestays have been approved through the Planning Commission inside the VDA to your knowledge? Not sure?

Mr. Hull: Again, I would have to double-check on those numbers.

Councilmember Kagawa: Okay. Thank you.

Committee Chair Chock: Okay.

Mr. Hull: I can say none in this past glut of twenty-five (25) applications received this past year. None of them are in the VDA.

Committee Chair Chock: Go ahead.

Councilmember Kagawa: Have you ever seen, in the time that you have been in Planning Department, any homestay applications inside the VDA get denied?

Mr. Hull: No.

Councilmember Kagawa: Thank you.

Committee Chair Chock: Okay. Thank you. Go ahead.

Councilmember Hooser: The Bill that is on the table now and the bill that is coming will both essentially legalize homestays within the VDA? That is the proposal for both of those bills?

Mr. Hull: To have them over-the-counter.

Councilmember Hooser: Right, but we do not know, as we sit here today, how many of them, illegally exist in the VDA, right? Okay. Thank you.

Mr. Hull: No.

Committee Chair Chock: Okay. Alright. Since the rules are suspended, I would like to take public testimony. We have three (3) registered speakers. Is that correct? Can you call the first one?

ALLISON S. ARAKAKI, Council Services Assistant I: The first registered speaker is Lorna Hoff, followed by John Hoff.

LORNA HOFF: Lorna and John Hoff, for the record. I do not want to take up too much time, but your haslet fee thing in 2005 said there were about one hundred (100) to two hundred (200) B&Bs, and so far I believe twenty-one (21) have been approved. All the contested cases on agricultural did have the ability to show that they could not operate, they could not show the financials, but I will get to that. Anyway, Bill No. 2609 should not pass until there is recognition within the Bill that grandfathering any B&B, homestay, or farm stay facility operating prior to 2008 is a duty or requirement as stated in HRS 46-4, which is the holy grail for zoning in Hawai'i. If you are not aware of this law, the following should convince this body that the hearing to grandfathering previously legal B&Bs, homestay operation, or farm stay operations Bill No. 2609 and County of Kaua'i will be breaking State law HRS 46-4, that states – we went through this. Nothing in this Section, HRS 46-4, "Nor Ordinance enacted pursuant to this Section shall prohibit the continued lawful use" by which John and I were lawfully operating, paying our taxes, "use of any building or premising for any trade, industrial, residential,

agricultural or purpose for which the building or premises is used at the time this Section or the Ordinance takes effect.” Our governing body’s recent pension towards breaking State and local laws is threatening the future of our islands and inhabitants welfare. The financial repercussions are yet to be seen. Other samples of lawbreaking: Ordinance No. 919 Section 2, Chapter 8, Section 8-24.2 Civil Fines (a); CZO Chapter 8, Section 8-3-3, 5 Enforcement, Legal Procedures; and Land Use Commission Section 205-13 Enforcement all agree, “prior to the issuance of any citation for a violation, the appropriate enforcement officer or agency shall notify the violator and mortgagee of any such violation and the violator or the mortgagee, if any, shall have not more than sixty (60) days to cure the violation before citation per violation is issued.” B&B owners received no notice of violation, just a surprise cease and desist order with fourteen (14) days to cancel current and incoming guests, refund their money, and shut down their B&B homestay, and farm stay business. “If Director of the Planning Department determines that any person is not complying with the notice of violation, the first notice, then and only then...”

Ms. Arakaki: Three (3) minutes.

Ms. Hoff: “...the Director may have the party responsible...”

Committee Chair Chock: Sorry, we are going to have to come back to it

Ms. Hoff: Can I take over his time?

Committee Chair Chock: Okay, sure. Three (3) more minutes.

Ms. Hoff: “...responsible for the violation served, second notice by mail or delivery and order pursuant to the Section.” As a matter of fact, the Director vocally verified this at our last meeting January 13th that was televised and he clarified the Council Chair’s understanding of the requirement of the first notice of violation. It also needs to be noted that there is a mortgagee often involved. If loans are assessed, we talked to our mortgagee owner and he says they are going to have to get in line because the mortgagee comes first. Lastly, the Planning Department consistently portrays B&Bs, homestays, and farm stays as operating illegally without proper permits from 1988 to 2016. This is a fallacy. They have been operating these past twenty-eight (28) years with the Planning Department’s total knowledge and approval of B&Bs operations. During that timeframe when B&Bs asked for applications and permits, they were informed that those items were not necessary. The Planning Department also informed us that they knew we were operating, paying our taxes, and that when the time came for permitting the B&Bs, the Planning Department would notify us. That notice was never received. If there is any doubt concerning this statement, just look at the span in years. This attachment showing that eight (8) permits were issued in twenty-eight (28) years with one (1) operation paying permit renewal fees annually from 1998 to 2016. The other seven (7) B&B ceased operations after a few years. Hurricane ‘Iniki could have been a factor in that. Even the Planning Department’s own hired contractor, Helber Hastert & Fee (HHF), the contracting firm, verifies this position on page 9 of their 2005 report. “While the Planning Department has not adopted a formal interpretation, the Planning Department has generally not required use permits for vacation rentals.” HHF also points out this hands-off policy concurred with the support of the County Planning Department and legal officials. This is 2005. If the Planning Department and County Council do not believe the B&B, homestay, and farm stay operators, they should believe their own hired contractor. A recent disclosure may shed a new light upon the acquisitions of B&B and homestays operating illegally since 1988 without licenses or permits. We recently came across a copy of the Kaua‘i Tourism Strategic Plan 2006-2015 page 2, Strategies to Achieve

Objective 1 for 2006-2009. Item 1(g) states “support the development of regulations to appropriately licensed, monitor, and enforce Bed & Breakfast, and individual vacation rental.” Apparently according to the Tourism Strategic Plan (TSP) published in 2016, the task before the TSP was to support the development of regulations to license, monitor, and enforce B&B operations. What that indicates is that there was no development creation.

Committee Chair Chock: Okay. I am sorry, your time is up.

Ms. Hoff: Thank you.

Committee Chair Chock: You should have three (3) minutes each when you come back for a second time.

JOHN HOFF: We will come back.

Ms. Hoff: Yes, I cannot talk fast enough.

Committee Chair Chock: No worries. Next.

Ms. Hoff: Thank you.

Ms. Arakaki: Next registered speaker is Tina Sakamoto.

TINA SAKAMOTO: Good afternoon, Planning Committee Chair and Committee Members. My testimony was submitted and written before the information we received, but I think some of it will parallel the second bill that is coming. Thank you for this opportunity again to speak on the homestay. I was going to ask for you to consider the amendment to the Bill, which would prohibit homestays outside of the VDA, but that is going to be your second bill. My basis would be that the term carrying capacity was an integral part or component of this year's Kaua'i County General Plan update. I think we should take it a step further and consider tourism carrying capacity, and that has been defined as a level of human activity in an area that can accommodate without the area deteriorating and the resident community being adversely affected. Now I see as homestay tourism if unregulated would cause significant negative impacts of the communities. Based on that, I would recommend that we align our values with our priorities, and that tourism belongs in properly zoned areas, not in the residential neighborhoods. Secondly, I want to speak on grandfathering. In hearing the testimony from our attorney, it had to be a continued legal operation in order to be grandfathered. So that would support me asking you for the consideration not to have grandfathering because if they were unpermitted homestays, that meant they were illegal, and we certainly cannot allow illegal unpermitted homestays to be grandfathered. Thank you.

Committee Chair Chock: Actually, you forgot to state your name for the record.

Ms. Sakamoto: Tina Sakamoto.

Committee Chair Chock: Thank you very much.

Ms. Sakamoto: You are welcome.

Committee Chair Chock: Next speaker.

Ms. Arakaki: We have no other register speakers.

Committee Chair Chock: Matt.

MATTHEW BERNABE: Matt Bernabe for the record. I would like to start off by saying good job by the people at the Planning Department because this is a hard place to be working from. The second thing I would like to say is that I support a deferral and an introduction of the second bill to put a different contrast on it. I think I just want to say again, I really think that this is one of the better thought out discussions of agenda items between Councilmembers and Departments, and this is one of the harder ones. So I just would like to commend both the Councilmembers, all of you, the Planning Department, and everybody involved even the lawyers. It was a very good discussion. I support the deferral.

Committee Chair Chock: Thank you. Anyone else for the first time?
Mr. Hart.

BRUCE HART: For the record, Bruce Hart. This is a really big issue. There is something that was discussed so I think it is okay for me to bring it up, and that was what is agricultural land and should there be TVRs allowed on agricultural land that is it really suited for the production of crops. One of the things that occurred to me immediately, I do not know if it has occurred to any of you, is that if you do allow TVRs on agricultural land that is not really productive as to the traditional agricultural purposes, that the speculation of that land is going to be unreal because suddenly land that relatively is modestly priced is going to be worth a lot of money because these TVRs make a lot of money. So if you can get them put on this land, suddenly the land is going to be worth a lot more money. Thank you.

Committee Chair Chock: Thank you. Anyone else for the first time there is if not...oh, Ken.

KEN TAYLOR: Chair and members of Council, Ken Taylor. I just wanted to make a statement that the question was asked about how you determine agricultural income versus some other income. There is a specific IRS form for agriculture and any legitimate agricultural operation uses that form. Other jurisdictions, when it comes down to making a decision are you agriculture or are you not agriculture, require that form to be presented saying "yes, I am agriculture." Without that form, you are not agriculture, along with sales tax, et cetera. I have never heard the requirement for that form in discussions when the issues have come up about agricultural income. I do not remember unfortunately, the exact number of that form, but it could easily be found and that should be part of the requirement when we are looking at agriculture and other incomes that be part of the package of proving that yes, you are in agriculture and here is my income because without that, there is really no way of putting a finger on what is there. Just something to think about. Thank you.

Committee Chair Chock: Thank you. Anyone else? If not, second time. I think the Hoff's have a little bit more testimony to offer.

Ms. Hoff: John and Lorna Hoff, for the record. Thank you again. I just wanted to answer Ken because we do have a bona fide plantation subdivision and the land scape portion is registered with the Federal government, with the IRS, and they do not have to fill out a Schedule F because of that registration. But to continue what I was saying here about all of these things that we found, apparently according to this Tourism Strategic Plan that was published in 2015, the task before this TSP was to support the development of regulations to license, monitor, and enforce B&B operations. What that indicates is that there was no such development and creation of mechanisms to fulfill that need. There never existed a format for the registering, permitting, or enforcement for B&Bs. The County of

Kaua'i never had such a system established and if that is true, how could B&Bs be accused of operating illegally if there were no rules, laws, or regulations to break?

Just this past week, January 8th, we downloaded the Kaua'i Tourism Strategic Plan update of 2016-2018, and it too has the same language in there, "a plan based on balance," page 2. On page 3 item number 8(1)f, this paragraph has virtually the same language. So as the 2016 there is still exists no official definition of rules and regulations that B&Bs, homestays, and farm stays can violate. I just want to point out when we went into the hearing, we were shut down immediately and not allowed to speak or talk to anyone or discuss anything. It went into a contested case hearing immediately and we could prove it, that thick, that agricultural is not agricultural or whatever. There are different realizations of agricultural, and that is a generalization. In our case, we had a soil analysis that was done for permitting, our house sits on a slope forty to seventy percent (40-70%), runoff is rapid, and geologic erosion is active. These soils are variable. The land type is used primarily for watershed and wildlife habitat. Soil classification, they gave a classification of Class VII E, which is a subclass soil. Soil is severely limited due to risk of erosion. This soil is used for sugar cane, pineapple, orchards, pastures, truck crops, and home sites. Lands that are V classified within the E-87 classification are considered the lowest producing lands within the system. The crop productivity rating for lands with E-87 class for crop E is E. Then what we ended up with in our place...

Committee Chair Chock: That is your first three (3) minutes. I will allow three (3) more.

Ms. Hoff: I will switch it over. Oh, that is it?

Mr. Hoff: No. Can she take my three (3) minutes?

Committee Chair Chock: Yes, go ahead.

Ms. Hoff: I am just ending it. Anyway, the existing use for this E-87 class of soil is grazing or forest. So John and I are down to one third (1/3) acre where our house does not sit. It is on a slope of eighty (80) degrees and it gets about ten percent (10%) sunlight during the day. I cannot put a horse on it. I had horses at one time. I cannot produce any crop on this specific point of area. I just think that this really needs to be looked at as you go on. I do not believe my property would go up in value really with a B&B because every year they are going to a run on it. God knows the taxes. B&Bs contrary to thought, do not make as much money as you would think. The amount of work and the amount of just what you have to pay to keep something like that going is just phenomenal.

Mr. Hoff: I would like to also say that we have been involved in agriculture for forty-four (44) years right next door to one of your board members. We have always been. She has thirty-five (35) years experience. I have got forty-four (44). We got here in 1966, bought land. We bought at least that property. I just cannot see how...

Ms. Hoff: Well, we just feel we are grandfathered.

Mr. Hoff: Yes. After fifty (50) years, I think we deserve it.

Ms. Hoff: We can show...we sent them...

Mr. Hoff: And our son is a licensed...

- Ms. Hoff: We did so much.
- Mr. Hoff: He took over two (2) of ours. I was a licensed contractor since 1974. She started a landscaping company and our son took it over. Now he is the second largest landscaping company. He has twenty (20) to twenty-five (25)...
- Ms. Hoff: Can I say something? Anyway, I want to say to that...
- Mr. Hoff: She does not want us talking about it.
- Ms. Hoff: I knew about permitting a long time ago because I was actually instrumental...
- Mr. Hoff: We tried to get permits.
- Ms. Hoff: Yes.
- Mr. Hoff: We tried to get permits and they did not have them, and they turned us away.
- Ms. Hoff: But to say I need...
- Mr. Hoff: We could not be legal. How can you be legal if you cannot get a permit?
- Ms. Hoff: Can I say something?
- Mr. Hoff: Go ahead.
- Ms. Hoff: Anyway, I was involved in the permitting process for the Marriott's Waiohai Beach Club and instrumental in getting them shoreline permitting with the archaeologist and everything. I was well aware of permitting. So I would go in when I did my B&B. I trusted my Planning Department and I trusted that they would say, "Yes, these people did come in."
- Committee Chair Chock: Okay, thank you.
- Ms. Hoff: Yes we were wronged.
- Councilmember Yukimura: I have a question.
- Ms. Hoff: Thank you.
- Committee Chair Chock: Hold on, Ms. Hoff, we have one (1) clarifying question.
- Councilmember Yukimura: Can you restate what you said you have a bona fide registration?
- Ms. Hoff: Yes, we are registered. My son is an ancillary to my property, he is registered with the Internal Revenue Service. Therefore, they do not have to file a Schedule F for his farm operations.

Councilmember Yukimura: Can you further explain what that is? I have no idea.

Ms. Hoff: What I can do...

Mr. Hoff: Our son has...

Committee Chair Chock: One (1) at a time, please. Thank you.

Ms. Hoff: Excuse me.

Mr. Hoff: Go ahead.

Ms. Hoff: I was just saying that I can get the exact wording from my daughter-in-law who runs the business, and E-mail you that information.

Councilmember Yukimura: Thank you.

Committee Chair Chock: Thank you. You answered the question. Thank you. Anyone for a second time?

There being no further testimony, the meeting was called back to order, and proceeded as follows:

Committee Chair Chock: I just want to say I do not want to set a precedent for testimony. I know that we allowed this couple who is a unit. That means you cannot actually take somebody else's three (3) minutes, just so you folks know out there, alright? Any further discussion members, before we ask for this deferral? Councilmember Kagawa.

Councilmember Kagawa: I think we kind of get mixed up because when we heard the Hoff's story, we think gee, why can we on the Council, just help the Planning Commission along by approving them hearing their story and hearing that the slope...you can kind of just picture it in your head. I have not about there. I have been to Darryl Kaneshiro's place so I know it is very slopey. It is probably more suited to raising sheep or what have you. As a citizen, to look at another agricultural property and to say well, why do not you raise sheep? I mean, not everybody is made to raise animals and has the know-how, the knowledge, and the resources to start an animal type of farm. When I look at their situation, it is tough. But unfortunately, the Council as a body, it is not our decision to go one-by-one, case-by-case and dictate which agricultural properties are in our view allowable to do a homestay and override the Planning Commission's decision. I think our focus should be more on just the broader picture and right now, what I am hearing from the Planning Department just worries me that we are still not really even having a clue as to what is out there. Then to have a bill that says well, we are going to say in black and white that we are going to allow more homestays outside the VDA, it is troubling for me, and that is why I am glad that we have the accompanying bill because for myself, I want to know what is out there before I add any more problems. As far as the agricultural ones, three (3) out of seven (7) got it. If I was one of the other four (4) or three (3) that gets recommended for denial, I would be upset because I think everybody can have an argument, like, why should HRS 205 be so restrictive and say "you have to make this income level or you do not get it." That income level pretty much comes from an arbitrary number whether they are really trying farming and cannot make that profit. I feel for you, the Hoff's, and some of the others who are in agricultural property. But my greater problem is trying to stop these residential neighborhoods from becoming like what happened to Mr. Lee's. They just have no inkling that their

neighborhood would come to the point that it is where it is like fifty percent (50%) tourist destination/residential neighborhood. That just concerns me and I want to do everything in my power on the Council to prevent that from happening in further neighborhoods because if you look at old Molokoa right here, it was about sixty (60) years ago, and that old Molokoa had strict covenants that it is for single-family residences. Can you believe that? It was strict sixty (60) years ago, that single-family residences allowed. No rental. No Additional Dwelling Units (ADUs). But then when we had subsequent ADU laws that said if you have a lot over ten thousand (10,000) acres, I guess some of the families took advantage of that, but do not see much in old Molokoa. There is very few. Everybody pretty much stuck to the covenants. I think that is how our land laws should be. It should be clear which areas you can possibly have other uses so everybody has a level playing field and not spot zoning here and there, if that makes sense. It is where I am at, Mr. Chair. Thank you for the accompanying bill.

Committee Chair Chock: Sure. Thank you. Councilmember Yukimura.

Councilmember Yukimura: Chair, are you recommending a period of deferral because it will take time before the bill gets through the Planning Commission and comes here? They have to hold a public hearing.

Committee Chair Chock: Yes, I am.

Councilmember Yukimura: So what is your...

Committee Chair Chock: I will state the motion effectively.

Councilmember Yukimura: Okay, well somebody else those make the motion.

Committee Chair Chock: Yes. Anything else?

Councilmember Yukimura: No.

Committee Chair Chock: Councilmember Hooser.

Councilmember Hooser: Yes. Thank you, Chair, for the opportunity to explore this issue and have this good discussion. It was good. What I see is two (2) main questions that we have to deal with challenges. One is are homestays and Bed & Breakfasts allowed in residential areas with use permit or not, and if so, is there a limit on them or what those parameters are? That is one question. The other question is the issue of grandfathering in. From the information that has been provided to us, it seems like the grandfathering in applies to just a handful of people. I have not seen hundreds of people on a list. I see ten (10), maybe twenty (20). I am not real clear on how many people there are, but it is certainly not hundreds. It is not four hundred (400). It is not like the TVR issue. From prior testimony, it is clear to me anyway, that vast majority of these people have been doing this for years, they have been doing it in the open, they have reached out to the Planning Department in the past and have been told, "Well, not now, but maybe later." The County has allowed them openly, and one could say encouraged them, by not cracking down ten (10) years ago or telling them at any time that you folks have to close up until now they have a cease and desist order. Again, it is a relatively small group of people and there is precedent for accommodating people like this. So, I would like to see that discussion move forward. We have done this for others in past. We have passed a law just for Coco Palms, two (2) or three (3) years giving them the benefit of a law that was going to expire, and we have yet to see them perform. That is a large operation and these are small mom and pop operations, longstanding members of the

community people involved, and responsible citizens who felt they were doing the right thing. I think we should, if possible, look for ways to accommodate them within the scope of this issue. Again, my remarks are prefaced on it being a very small number. If it is hundreds of them, then deal is off. We have to look closer, but it is my understanding it is just a handful. I would like to have that discussion as well as explore the discussion further whether or not in some situations governed by a special use permit, they should be allowed in residential areas. Thank you.

Committee Chair Chock:

Thank you. Anyone else? Okay, go ahead.

Council Chair Rapozo:

Thank you. I think I share the sentiments from the other Councilmembers. As far as grandfathering, that is just the law. If they were operating lawfully, then they are allowed to continue. I mean, we have no choice. That is just the way it is, if they were lawfully operating. If they were not lawfully operating, then unfortunately, they do not. If for some reason these allegations of the Planning Department knowing and allowing or authorizing the unlawful activity and that is proven, then I would guess they would have a claim against this County and against the Planning Department. I would hope that individual or individuals that were responsible would be held accountable for that. Whether in the VDA or outside of the VDA, I think it is a great idea to have the two (2) bills simultaneously. We can have the discussion so we can weigh that out. But I think one of the things that we cannot ignore is the community's input, the feeling of the community. The homeowner, the resident, does not care if it is TVR or a B&B. It does not matter to them. It is transient people coming in and coming out. It is occupying neighborhoods that were designed to be residential neighborhoods and now it is becoming visitor destinations. It is looking at those people that have created miniature resorts under the guise of Bed & Breakfasts or TVRs. It just takes a very short period of time to Google either TVR or B&B on Kaua'i, and you will see what is out there. B&Bs, they say it is B&Bs, but it is actually a miniature resort with Jacuzzis, with multi-use, and multiple entrances. You have these different lockout units that have basically created an inn or a motel in a residential area saying it is a Bed & Breakfast. That is not what a Bed & Breakfast is. I do not want anybody says. For me, a Bed & Breakfast is a single-family residence that has an entrance and exit, it may have one (1) or two (2) doors, but one (1) key gets you in the house. You do not have five (5) keys and when the person comes in and he checks in, you give them one (1) of the five (5) and only he has access to that room or he has a separate entranceway. That is a hotel. That is a motel. That is an inn. A Bed & Breakfast is where I open up a house, you get to stay in one (1) of my rooms, you use my toilet, you use my shower, we cook a breakfast for you in the morning, we share the culture, we share the experiences of this beautiful island, and you go on your way and enjoy your day. You come back home, "home," not to a hotel room or motel, but to a home with a family or a couple and you share that their experience. That is a Bed & Breakfast. But we stretch that to now it is a commercial operation. It is a miniature hotel, miniature resort. I want to just be really cautious that as we look through whatever bill we have on this table, that we remember residents that is living next door that has to deal with the traffic coming back home at 1:00 a.m., 2:00 a.m., or waking up at 3:00 a.m.

I work at a hotel and I work the midnight shift. Guess what? 4:00 a.m. or 5:00 a.m. people are wide awake because they come from a six (6) or five (5) hour time difference. They are thinking it is 10:00 a.m. The body is saying it is 10:00 a.m., but it is not 10:00 a.m. It is 5:00 a.m. They walk around hotel at 3:00 a.m. "Oh, you are up early, sir." "Yes, it is 7:00 a.m. or 8:00 a.m. where I am from." That is what the neighbors have to deal with, and I think we cannot forget about that. It is a residential area, number one. If you want to open up your room, I really do not have a problem with that if fact we comply with the law and that the true intent of a Bed & Breakfast is what we have. But the abuse, the whole TVR debacle, we never solved

any problems with that. We never solved it. There is no attrition. In fact I think today we have more TVRs than we did before we passed the law. In my estimation looking at the websites, it looks like we have more, and we have got more people qualified for it, came in when they should not have ever gotten a permit. If we are not careful, the same there will happen with B&Bs. If you are not legally lawfully operating, then I am sorry. You had your run and now it is time to comply. It is just the way it works. I know it is a hard stand, but if you want to stop infiltration, then it is going to take that kind of tough decisions. That is all I have. Thank you.

Committee Chair Chock: Thank you. Anyone else? Councilmember Yukimura, second time.

Councilmember Yukimura: I think Councilmember Hooser made a good distinction between the two (2) issues. One is the one that Council Chair has been talking about whether and if so how much of the neighborhoods would be allowed to have Bed & Breakfasts or vacation rentals. The other is the issue of grandfathering in a small group of people who have been operating for a long time with an effort to be legal. "Grandfather" is not the right word in the sense that what happened with vacation rentals, stand-alone vacation rentals, is they were not legally operating on agricultural lands, and by Council ruling were allowed. Theoretically also, a small number, bigger than I think the homestays, but much smaller than are probably operating today, ironically. When we first dealt with the TVR issue, and we are very set on saying it is only in VDA areas, we did look at outside VDA areas and most communities were okay if only ten percent (10%) of the neighborhood were VDAs. But when it came to places like 'Anini where over fifty percent (50%) were VDAs, that was no neighborhood at all.

(Councilmember Kagawa was noted as not present.)

Councilmember Yukimura: So there was some thought to do this as a lottery, ten percent (10%) only, but you have to define what because if the neighborhood is because if the neighborhood is all of Kilauea, ten percent (10%) is all of 'Anini. So those are some of the complications, and the presumption is that you can actually enforce this thing and keep the operations at ten percent (10%) or five percent (5%) or fifteen percent (15%), whatever you decide, just so that is there is a real neighborhood left. But it also hinges on being able to enforce the law, and so far, we have not really given confidence that we can enforce it. Those are the issues as we lay them out, and if we decide to do them all in the VDA area, there is still that issue of the few that have been operating. Thank you.

Committee Chair Chock: Thank you. So I will take a few minutes as well. I just wanted to clarify that it was not the Committee's interest. It was my interest to see that another bill be drafted that contains homestays to the VDA. I have done so because of some that has been talked around the table, which is this inability to enforce, for one. I have heard it earlier from Vice Chair Kagawa about make it simpler, and I believe this is the first step. If we want to use the right mechanism that is in place, is to move our zones the way we as we grow and establish that, and we would be a little bit more in charge of where they can show up. In my opinion, it will provide an easier way to manage something that is out of control. That being said, I think that we also need to be careful, and I did not get to have this discussion but would like to just throw it out there for our Planning Department and our Planning Commission to consider the fact that if you are going reserve this to VDA and the intention is to in the future expand VDAs so that homestays can be in a specific area, then we need to be careful because that is also allowing hotels and

resorts to expand as well. So there may be a different kind of classification that we are looking at for VDAs or specific for homestays. One way or another, I think the discussion around the table is that we need a process and we need to establish it. That being said, the whole discussion on grandfathering, I think I am going send it in for an official opinion because what I heard here today was a little bit conflicting and almost said what happened in the past was not within our purview in terms of grandfathering. I want to be clear what we can and cannot do in terms of grandfathering and whose *kuleana* it is.

I think it is fairly unfair based on what I have heard, the five (5) to seven (7) that are currently in contested case hearing right now and what they have to go through just because they have wanted to comply with what we have created and the timing has been such that they have not been able to catch up. Their interest in doing something legal in accordance with our County process is just taking them in a different direction. They have been operating for many years.

(Councilmember Kagawa was noted as present.)

Committee Chair Chock: In the Hoff's case, if they knew the standard was going to be this Form F and that it would have to set a precedence on agriculture, perhaps they would not have Condominium Property Regime (CPR) those lots. Perhaps they can use the whole company's financial holdings, which is being said that they cannot right now. I think that these are really minute things to be considered in some of these cases, specifically the five (5) to seven (7) that have come forth. Yes, this I very complex and here are the complex issues, so can you work with us on it? Thank you for the time to get together and talk about this. I am open to listening to what some of the other amendments on the current Bill, but I am pretty strong on the fact that what I want to see happen is that we start at a place where we can have a footing and a hold on future growth for all TVRs, and unfortunately homestays in this case, does fall into that category to some degree. With that, anything further?

Councilmember Yukimura: I just want to say, Committee Chair, that I see what you are trying to say about holding ground by keeping it all within Visitor Destination Areas, except that with the stand-alone TVRs, we are not doing a very good job anyway because we have not shown we are able to enforce and keep TVRs out of non-VDA areas.

Committee Chair Chock: I understand. There will be more discussion on this. The motion is to move to defer until the Planning Commission submits a new bill to the Council and is referred to the Planning Committee. Can I get a motion?

Councilmember Kaneshiro moved to defer pending the transmittal of a new bill from the Planning Commission on the related topic; once the bill is transmitted to the Council and assigned to the Planning Committee, Bill No. 2609 will be concurrently placed on the agenda, seconded by Councilmember Kagawa, and unanimously carried.

There being no further business, the meeting was adjourned at 3:35 p.m.

Respectfully submitted,



Allison S. Arakaki
Council Services Assistant I

APPROVED at the Committee Meeting held on March 2, 2016:



MASON K. CHOCK, PL Committee